

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DF LAND DEVELOPMENT, LLC,

Plaintiff-Appellant,

v

CHARTER TOWNSHIP OF ANN ARBOR,

Defendant-Appellee.

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UNPUBLISHED

November 17, 2011

No. 298858

Washtenaw Circuit Court

LC No. 06-000491-CZ

Before: TALBOT, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

DF Land Development, L.L.C. (hereinafter “DF Land”) challenges the grant of summary disposition in favor of Ann Arbor Township (hereinafter “the township”) in this zoning dispute. We affirm.

DF Land owns 54 acres of vacant land in the northeast portion of the township. The property is currently zoned “A-1,” which permits farming and agricultural use or, alternatively, residential development restricted to construction of one residential unit for each ten acre lot. DF Land petitioned to rezone the property to “R-7,” to allow for the development of multi-family residential units at a higher density of units for each acre of land. The Planning Commission and Board of Trustees denied DF Land’s request for rezoning.

DF Land filed a complaint in the Washtenaw Circuit Court asserting a substantive due process claim pertaining to the restricted use of the subject property and that the township’s decision constituted exclusionary zoning and a taking of the property. The trial court granted summary disposition in favor of the township finding that the township ordinance was not exclusionary because it did not prohibit establishment of an R-7 land use within the area. The trial court also dismissed DF Land’s substantive due process claim, finding it failed as a matter of law.

“A trial court’s grant of summary disposition is reviewed de novo to determine whether the prevailing party was entitled to judgment as a matter of law.”<sup>1</sup> “In reviewing a motion under

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<sup>1</sup> *Conlin v Scio Twp*, 262 Mich App 379, 382; 686 NW2d 16 (2004).

MCR 2.116(C)(10), the court must examine the documentary evidence submitted by the parties and, drawing all reasonable inferences in favor of the nonmoving party, determine whether there is a genuine issue of material fact.”<sup>2</sup>

DF Land challenges the dismissal of its substantive due process claim arguing that retention of A-1 zoning for the property is arbitrary and capricious. DF Land contends that the current zoning of the property is unreasonably restrictive as it precludes a more economically viable use for the land. According to DF Land, the current zoning violates due process as it effectively results in an inverse condemnation of the property through regulation.

It is well-recognized that both the Michigan and United States Constitutions guarantee that no person shall be deprived of life, liberty, or property without due process of law.<sup>3</sup> “The essence of a claim of a violation of substantive due process is that the government may not deprive a person of liberty or property by an arbitrary exercise of power.”<sup>4</sup> Specifically, this Court has stated:

Judicial review of such a challenge requires application of three rules: (1) the ordinance is presumed valid; (2) the challenger has the burden of proving that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of the property; that the provision in question is an arbitrary fiat, a whimsical ipse dixit; and that there is not room for a legitimate difference of opinion concerning its reasonableness; and (3) the reviewing court gives considerable weight to the findings of the trial judge.<sup>5</sup>

“To sustain a substantive due process claim against municipal actors, the governmental conduct must be so arbitrary and capricious as to shock the conscience.”<sup>6</sup> Our Supreme Court has also emphasized that a zoning “ordinance comes to us clothed with every presumption of validity” and rejecting the view that the appellate courts function “as a super-zoning commission.”<sup>7</sup>

To establish that a land use regulation is unconstitutional “as applied” it must be shown “(1) that there is no reasonable governmental interest being advanced by the present zoning classification or (2) that an ordinance is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the area in question.”<sup>8</sup> “An

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<sup>2</sup> *Id.*

<sup>3</sup> US Const, Am XIV; Const 1963, art 1, § 17.

<sup>4</sup> *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 173; 667 NW2d 93 (2003).

<sup>5</sup> *A & B Enterprises v Madison Twp*, 197 Mich App 160, 162; 494 NW2d 761 (1992) (citations omitted).

<sup>6</sup> *Mettler Walloon LLC v Melrose Twp*, 281 Mich App 184, 198; 761 NW2d 293 (2008).

<sup>7</sup> *Brae Burn, Inc v Bloomfield Hills*, 350 Mich 425, 432; 86 NW2d 166 (1957).

<sup>8</sup> *Dorman v Clinton Twp*, 269 Mich App 638, 650-651; 714 NW2d 350 (2006) (citation omitted).

‘as applied’ challenge alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution.”<sup>9</sup> “[I]t is the burden of the party attacking to prove affirmatively that the ordinance is an arbitrary and unreasonable restriction upon the owners [sic] use of this property.”<sup>10</sup> In determining the validity of a zoning ordinance, consideration must be given to “the character of the district, its peculiar suitability for particular uses, the conservation of property values and the general trend and character of building and population development; unsuitability for residential purposes; lack of market for such purpose, and whether the land will become ‘dead land’ or non-income-producing land without residential value.”<sup>11</sup> The question to be posed then becomes “[a]s to this property, in this city, under this particular plan (wise or unwise though it may be), can it fairly be said there is not even a debatable question? If there is, we will not disturb.”<sup>12</sup> “[M]ore than a fair difference of opinion” is required.<sup>13</sup>

In evaluating the application of the zoning ordinance to this property, we begin with an analysis of whether the ordinance serves a legitimate governmental interest. We note that this Court has previously indicated that preservation of the identity or character of an area constituted a legitimate governmental interest that can be advanced through zoning.<sup>14</sup> We have also recognized that the preservation of the agricultural or rural nature of an area serves to further a legitimate governmental interest,<sup>15</sup> and that density restrictions may appropriately advance a municipality’s goal to avoid overcrowding and the retention of open space.<sup>16</sup> Other recognized governmental interests include maintaining the compatibility with surrounding areas, the protection of natural resources and ensuring the availability of adequate infrastructure to support development within an area.<sup>17</sup> A legitimate governmental interest furthered by zoning may also encompass the protection and improvement of the aesthetics of a designated area.<sup>18</sup>

Evidence was submitted that the township’s zoning ordinance served to preserve the rural character, natural features and availability of open areas by limiting residential development on the property through density restrictions. Even the expert proffered by DF Land agreed that the township’s zoning ordinance served certain legitimate governmental interests and that the current

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<sup>9</sup> *Paragon Properties Co v Novi*, 452 Mich 568, 576; 550 NW2d 772 (1996).

<sup>10</sup> *Brae Burn*, 350 Mich at 432.

<sup>11</sup> *Alderton v Saginaw*, 367 Mich 28, 34; 116 NW2d 53 (1965) (internal citations omitted).

<sup>12</sup> *Brae Burn*, 350 Mich at 433.

<sup>13</sup> *Id.* at 432.

<sup>14</sup> *Dorman*, 269 Mich App at 651-652.

<sup>15</sup> *Scotts Ventures v Hayes Twp*, 212 Mich App 530, 533; 537 NW2d 610 (1995).

<sup>16</sup> *Conlin*, 262 Mich App at 387-388.

<sup>17</sup> *Frericks v Highland Twp*, 228 Mich App 575, 608-609; 579 NW2d 441 (1998).

<sup>18</sup> *Norman Corp v City of East Tawas*, 263 Mich App 194, 200-201; 687 NW2d 861 (2004).

zoning of the property advanced those interests.<sup>19</sup> Although the trial court acknowledged that the various experts presented by the parties disagreed regarding the township's interest in maintaining the property as currently zoned and the benefits and impact of rezoning as requested by DF Land, such disagreements comprised nothing more than differences of opinion, which are insufficient to demonstrate a constitutional violation.<sup>20</sup> DF Land's argument that failure to rezone the property precludes its most economically viable function is irrelevant as "property need not be zoned for its most lucrative use."<sup>21</sup>

As the denial of the request to rezone this tract was consistent with its historical use and served recognized, legitimate governmental interests pertaining to the maintenance of the character of the area, it did not comprise an arbitrary or capricious act. Because DF Land failed to meet the requisite burden of proof and the trial court's findings are entitled to substantial deference,<sup>22</sup> the grant of summary disposition in favor of the township was proper.

To the extent that DF Land implies that a substantive due process violation can occur where the property has been condemned by inverse condemnation, we note that an inverse condemnation claim was not pleaded. Contrary to DF Land's assertion, this Court has specifically determined that "claims of permanent or temporary regulatory taking of private property for public use without just compensation come within the protection of the Fifth Amendment," and therefore "cannot invoke the Due Process Clause."<sup>23</sup>

DF Land also contends that the township's zoning is unlawfully exclusionary. Despite the general presumption of validity,<sup>24</sup> "the creation of a zoning classification without attaching it to any specific land" is "invalid on its face[.]"<sup>25</sup> "[A]n ordinance which *totally* excludes from a municipality a use recognized by the constitution or other laws of this state as legitimate also carries with it a strong taint of unlawful discrimination and a denial of equal protection of the law as to the excluded use."<sup>26</sup> But, "[s]uch a taint can hardly be presumed to be present . . . when the general use is reasonably permitted in the community and the only issue is whether it was

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<sup>19</sup> *Landon Holdings*, 257 Mich App at 173-174.

<sup>20</sup> *Brae Burn*, 350 Mich at 432.

<sup>21</sup> *Equitable Bldg Co v City of Royal Oak*, 67 Mich App 223, 227; 240 NW2d 489 (1976).

<sup>22</sup> *Conlin*, 262 Mich App at 390.

<sup>23</sup> *Cummins v Robinson Twp*, 283 Mich App 677, 704; 770 NW2d 421 (2009).

<sup>24</sup> *Landon Holdings*, 257 Mich App at 174.

<sup>25</sup> *Smookler v Wheatfield Twp*, 394 Mich 574, 577; 232 NW2d 616 (1975).

<sup>26</sup> *Kropf v City of Sterling Heights*, 391 Mich 139, 155-156; 215 NW2d 179 (1974) (emphasis in original).

arbitrarily or capriciously denied as to this particular parcel of land.”<sup>27</sup> Indeed, “a use is not necessarily excluded simply because it does not yet exist[.]”<sup>28</sup>

DF Land correctly asserts, despite a provision for R-7 zoning in the township ordinance, that there are currently no properties designated as such on the township map. Testimony by experts for both parties, however, demonstrated that 28 to 37 percent of the residential units in the township were comprised of multi-family housing or met the R-7 zoning designation. This evidence sufficiently demonstrated, with regard to R-7 zoning, that “the general use is reasonably permitted in the community.”<sup>29</sup> The failure to currently designate specific property as zoned for R-7 does not permit an assumption that the township intended to forever preclude low density multiple-family residential zoning.<sup>30</sup> Reliance on such an assumption would be misplaced as the township’s general development plan includes R-7 zoning and specifically contemplates “[a] variety of dwelling units, in terms of types, sizes, and cost ranges . . . [to] insure a choice of dwelling unit types and prices and a socioeconomic mix of the population.”

Because the evidence shows that multiple-family residential dwellings are not completely prohibited in the township, DF Land has failed to meet the burden required to establish an exclusionary zoning claim and the trial court’s grant of summary disposition in favor of the township on this issue is affirmed.

Finally, DF Land argues that the trial court erred in failing to determine the reasonableness of its proposed use of the land. The reasonableness of an owner’s proposed use of property is not an appropriate inquiry unless a court has first determined that an existing zoning classification is unconstitutional.<sup>31</sup> Because the trial court properly granted summary disposition in favor of the township on DF Land’s constitutional substantive due process and exclusionary zoning claims, there was no reason for the trial court to address whether DF Land’s proposed use of the property was reasonable.

Affirmed.

/s/ Michael J. Talbot  
/s/ E. Thomas Fitzgerald  
/s/ Jane E. Markey

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<sup>27</sup> *Id.* at 156.

<sup>28</sup> *Landon Holdings*, 257 Mich App at 168-169.

<sup>29</sup> *Kropf*, 391 Mich at 156.

<sup>30</sup> *Landon Holdings*, 257 Mich App at 168.

<sup>31</sup> *Rogers v Allen Park*, 186 Mich App 33, 40; 463 NW2d 431 (1990).